The Principles of Probable Cause

"[T]here are few absolutes in the area of the law dealing with what constitutes probable cause." [1]

What is probable cause? More to the point, how can officers determine whether they have it? These are questions that officers encounter on a regular basis, and they are questions that have serious repercussions. After all, thousands of times each day, officers throughout the country are arresting people and searching homes and other places because they think they know the answers.

Another persistent question—What is reasonable suspicion?—is almost as important because reasonable suspicion (which is merely probable cause lite) is the level of proof required for detentions and pat searches.[2]

Despite their importance, these questions have no straightforward answers. As the United States Supreme Court observed, "Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible."[3] As a result, when the courts need to explain these subjects they will often take evasive action and say something like:

- "It is not a finely-tuned standard."[4]
- "It is somewhat abstract."[5]
- "It is incapable of precise definition."[6]
- "It is a fluid concept."[7]
- "There is no exact formula."[8]
- "It cannot be reduced to a neat set of rules."[9]

This does not mean that probable cause is a difficult concept or that it depends largely guesswork or intuition. Instead, like many things in life, it just requires a careful assessment of the circumstances at hand. And this, in turn, requires an understanding of the principles upon which probable cause is based.

We begin an extended discussion of probable cause and reasonable suspicion by examining those principles and explaining how the courts apply them to the circumstances that officers tend to encounter on patrol and in the course of their investigations. In the article beginning on page 11, we take on an issue that frequently torments officers: How to establish the reliability of informants and other people who furnish information that is used to establish probable cause.

We will conclude our discussion in the Summer edition by surveying the circumstances upon which probable cause and reasonable suspicion are commonly based, and examining the problems that arise in establishing probable cause to conduct searches.

But first, we must define terms.

DEFINITIONS

Although definitions are often pointless, the definitions of probable cause and reasonable suspicion are helpful because they direct attention to two core principles: (1) the amount of probability required, and (2) the importance of common sense.

PROBABLE CAUSE TO SEARCH: In the landmark case of *Illinois* v. *Gates*, the Supreme Court introduced the term "fair probability." Specifically, it ruled that probable cause to search exists if there is a "fair probability" or "substantial chance" that evidence of a crime will be found at a certain location.[10]

[1] *Jackson* v. *U.S.* (D.C. Cir. 1962) 302 F.2d 194, 196.
[2] See *Alabama* v. *White* (1990) 496 U.S. 325, 330 ["Reasonable suspicion is a less demanding standard than probable cause"]; *Terry* v. *Ohio* (1968) 392 U.S. 1, 27-8; *Humphrey* v. *Appellate Division* (2002) 29 Cal.4th 569, 574 ["The lesser burden of persuasion warrants a lesser burden of production."].
[3] *Ornelas* v. *United States* (1996) 517 U.S. 690, 695.
[4] *Ornelas* v. *United States* (1996) 517 U.S. 690, 696. [5] *United States* v. *Arvizu* (2002) 534 U.S. 266, 274. [6] *Maryland* v. *Pringle* (2003) 540 U.S. 366, 371. [7] *Illinois* v. *Gates* (1983) 462 U.S. 213, 232. [8] *People* v. *Ingle* (1960) 53 Cal.2d 407, 412. [9] *United States* v. *Sokolow* (1989) 490 U.S. 1, 7.
[10] (1983) 462 U.S. 213, 244.

PROBABLE CAUSE TO ARREST: Before *Gates*, probable cause to arrest was variously defined as an "honest and strong suspicion,"[11] or a state of facts that would cause a "prudent" person to believe that the suspect committed the crime under investigation.[12] And while some courts continue to cite these definitions, the trend is to apply the same "fair probability" standard that is used in determining the existence of probable cause to search.[13] Specifically, probable cause to arrest exists if there is a fair probability or substantial chance that the suspect committed the crime.

REASONABLE SUSPICION: There is no useful definition of reasonable suspicion. There is not even a nominal test, such as "fair probability." This is because, as noted, reasonable suspicion is merely a variant of probable cause.[14] So, rather than trying to define it, the courts usually say that reasonable suspicion exists if officers had some concrete facts that a reasonable person would have considered suspicious to some unspecified degree.

WHAT INFORMATION WILL (AND WILL NOT) BE CONSIDERED

Because probable cause and reasonable suspicion are merely assessments of the convincing force of information, the question arises: What information may be considered? The answer is very simple but important: *hard facts*. This is such a fundamental principle that the United States Supreme Court has described it as the "central teaching" of its cases on the Fourth Amendment.[15] Or, as the California Court of Appeal observed, "Over and over again the cases instruct that the question of reasonable cause is to be determined by reference to the particular facts and circumstances in the case at hand."[16]

A good example of hard facts and their importance in establishing probable cause and reasonable suspicion is found in another landmark case: *Terry* v. *Ohio*.[17] Here, an officer in downtown Cleveland detained Terry after watching him and another man engage in "suspicious" activity. In court, however, the officer did not merely assert that the men were acting "suspiciously." On the contrary, he explained exactly what he saw. As the Court noted:

> [The officer] saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips.

Notice the number of pertinent details the officer provided. This is how reasonable suspicion and probable cause are established—and it's the first thing that judges look for.

Here's another example. In *People* v. *Spears*[18] the court ruled that the following facts established probable cause to believe that the defendant, an employee of a Chili's restaurant in Cupertino, had shot

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[11] See *People* v. *Guajardo* (1994) 23 Cal.App.4th 1738, 1742; *People* v. *Wilkins* (1993) 14 Cal.App.4th 761, 770.
[12] See *Henry* v. *United States* (1959) 361 U.S. 98, 102; *Beck* v. *Ohio* (1964) 379 U.S. 89, 91.
[13] See *Bailey* v. *Superior Court* (1992) 11 Cal.App.4th 1107, 1111 ["Probable cause to issue an arrest or search warrant [exists if] there is a fair probability that a person has committed a crime or a place contains contraband or evidence of a crime."]; *People* v. *Rosales* (1987) 192 Cal.App.3d 759, 767-8 ["We see no reason why the full *Gates* ['fair probability'] rationale . . . should not be as fully applicable to the question of probable cause to support an arrest as it is to a search."].
[14] See *Alabama* v. *White* (1990) 496 U.S. 325, 330; *U.S.* v. *McCoy* (4th Cir. 2008) 513 F.3d 405, 411 [reasonable suspicion "defies precise definition"].
[15] *Terry* v. *Ohio* (1968) 392 U.S. 1, 21, fn.18; *U.S.* v. *Cortez* (1981) 449 U.S. 411, 418. ALSO SEE *Brown* v. *Texas* (1979) 443 U.S. 47, 51 ["[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts"].
[16] *People* v. *Maltz* (1971) 14 Cal.App.3d 381, 390-1. ALSO SEE *U.S.* v. *McCoy* (4th Cir. 2008) 513 F.3d 405, 415 ["Particularized, articulable facts are always required."].
[17] (1968) 392 U.S. 1.
[18] (1991) 228 Cal.App.3d 1.

and killed the manager while robbing him before the restaurant opened for the day: the defendant had left home shortly before the murder occurred even though it was his day off; there were no signs of forced entry; the defendant had given conflicting statements about his whereabouts when the murder occurred; and, after discovering the victim's body, the defendant told other employees that the manager had been "shot," even though he could not have known this based on the condition of the victim's body.

Baseless "facts" and hunches

In sharp contrast to facts with substance are vague or unsubstantiated tidbits of information. Included in this category are unsupported conclusions of fact, conclusions of law, and hunches. Not only do judges ignore these things, they will usually assume that officers who rely on them have a weak case or that they do not understand the basics of probable cause.

UNSUPPORTED CONCLUSIONS OF FACT: As we will discuss shortly, judges will consider an officer's opinion on relevant matters if it is based on his training and experience. But unsupported conclusions of fact are another matter. As the Court in *Illinois* v. *Gates* pointed out, officers cannot establish probable cause to search a suspect's home by saying something like, "I have received reliable information from a credible person and believe that heroin is stored there." Said the Court, "[T]his is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause."[19]

For example, in a recent case from Texas, the federal district court ruled that a DEA agent's pen register application was inadequate because he merely said that the DEA had "identified" certain suspects, and that its investigation had "revealed" certain things. As the court pointed out, the application "fails to focus on specifics necessary to establish probable cause, such as relevant dates, names, and places."[20]

CONCLUSIONS OF LAW: Officers should never offer legal opinions such as, "I have probable cause," or "My informant is reliable." These are determinations that are solely within the province of the judge. Instead, when writing affidavits or testifying in court, officers should just set forth the facts which would assist the judge in making these kinds of findings.

HUNCHES: Although hunches are useful in police work, they are irrelevant in determining the existence of probable cause. As the Ninth Circuit noted:

> A hunch may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction. A hunch, however, is not a substitute for the necessary specific, articulable facts required to justify a Fourth Amendment intrusion.[21]

Opinions and inferences

In determining whether probable cause exists, the courts will consider an officer's opinion as to the meaning or significance of the facts if it was based on his training and experience.[22] In the words of the United States Supreme Court, "The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[23] Or, as the Court explained in *United States* v. *Arvizu:*

> This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.[24]

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[19] *Illinois* v. *Gates* (1983) 462 U.S. 213, 239.
[20] *In the Matter of the Application of the United States* (S.D. Texas 2007) Slip copy [2007 WL 3355602].
[21] *U.S.* v. *Thomas* (9th Cir. 2000) 211 F.3d 1186, 1192.
[22] See *United States* v. *Arvizu* (2002) 534 U.S. 266, 273 ["This process allows officers to draw on their own experience and specialized training"]; *Ornelas* v. *United States* (1996) 517 U.S. 690, 699 ["[A] police officer views the facts through the lens of his police experience and expertise."]; *United States* v. *Cortez* (1981) 449 U.S. 411, 418 ["[A] trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person."]; *U.S.* v. *McCoy* (4th Cir. 2008) 513 F.3d 405, 414 ["[T]he reasonable suspicion determination demands that facts—whether seemingly innocent or obviously incriminating—be assessed in light of their effect on the respective officer's perception of the situation at hand."].
[23] *Illinois* v. *Gates* (1983) 462 U.S. 213, 232.
[24] (2002) 534 U.S. 266, 273.

We saw an example earlier in *Terry* v. *Ohio* where an officer, having watched Terry and another man for a few minutes, concluded they were casing a store for a robbery. As the United States Supreme Court pointed out, the officer testified that he had "been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years," and that he had "developed routine habits of observation over the years and that he would 'stand and watch people or walk and watch people at many intervals of the day.' He added: 'Now, in this case when I looked over they didn't look right to me at the time.'" Because this was a reasonable inference based on specific facts, the Court ruled it was properly considered.

The courts will also consider reasonable inferences based on facts. For example, in *People* v. *Soun*[25] the defendant and three other men killed the owner of a video store in San Jose during a botched robbery. The men were all described as Asian, but witnesses provided conflicting descriptions of the getaway car. One said it was a two-door Japanese car; another said it was a "small foreign car," maybe a Toyota. Two of the witnesses saw the license number. One said he thought it began with 1RCS, possibly 1RCS525 or 1RCS583. The other said he thought the number was 1RC[?]538.

A San Jose officer who was monitoring these developments at the station figured that the actual license plate probably began with 1RCS, and he theorized that the last three numbers included a 5 and an 8. So he started running these combinations through DMV until he got a hit on 1RCS558, a 1981 Toyota registered in Oakland. There was another circumstance that added to the likelihood that this was the right car: the registered owner had an Asian surname.

This information was transmitted to officers in Oakland who, the next day, stopped the car, detained the occupants, and eventually arrested them. On appeal, one of the occupants, Soun, argued that the detention was based on nothing more than "hunch and supposition." On the contrary, said the court, it was based on "intelligent and resourceful police work."

Information not transmitted

As a general rule, information will not be considered in determining the existence of probable cause or reasonable suspicion unless it had been communicated to the officer who made the arrest, detention, or search. To put it another way, a search or seizure without sufficient justification cannot be validated in court by showing that it would have been justified if the officers had been aware of information possessed by their colleagues.[26] As the California Supreme Court explained in *People* v. *Gale*, "The question of the reasonableness of the officers' conduct is determined on the basis of the information possessed by the officer at the time a decision to act is made."[27]

For example, in *United States* v. *Colon*[28] a woman phoned 911 in New York City and said she was just inside a bar when a man, whom she described, hit her over the head with a gun. Although she would not give her name, she said the "same guy" hit her about three weeks earlier, and that "[t]he cops know about the incident so I don't have to give you my name." The operator transmitted the call to a dispatcher but did not include the information about the prior incident. When the responding officers spotted a man inside the bar who matched the description, they pat searched him and found a handgun.

[25] (1995) 34 Cal.App.4th 1499.

[26] See *United States* v. *Jacobsen* (1984) 466 U.S. 109, 115; *Maryland* v. *Garrison* (1987) 480 U.S. 79, 85 ["But we must judge the constitutionality of [the officers'] conduct in light of the information available to them at the time they acted."]; *People* v. *Coleman* (1968) 258 Cal.App.2d 560, 563, fn.2 ["The police cannot pool their information after an arrest made on insufficient cause."]; *Giannis* v. *City of San Francisco* (1978) 78 Cal.App.3d 219, 224 ["[T]he knowledge which may have been possessed by anyone besides the arresting officers is irrelevant."]; *People* v. *Talley* (1967) 65 Cal.2d 830, 835 ["The question of probable cause to justify an arrest without a warrant must be tested by the facts which the record shows were known to the officers at the time the arrest was made."]; *People* v. *Adams* (1985) 175 Cal.App.3d 855, 862 ["[A] warrantless arrest or search cannot be justified by facts of which the officer was wholly unaware at the time."].

[27] (1973) 9 Cal.3d 788, 795.

[28] (2nd Cir. 2001) 250 F.3d 130.

The parties agreed that if the officers had been told that the woman had, in effect, identified herself, they would have had grounds for the pat search. It might also have been lawful if the operator had been trained in making reliability determinations for Fourth Amendment purposes and had notified the officers that the caller met the necessary requirements. But, as the court noted, "The record here contains no evidence of whether or how 911 operator training is directed in any way to developing that ability, and thus contains nothing from which to conclude that the operator taking the call was capable of determining whether reasonable suspicion for the stop and frisk existed." Thus, the court ruled the pat search was unlawful.

The "collective knowledge" rule

Although the courts do not permit post-arrest pooling of information to establish probable cause, they will presume that officers who were working on a case had shared relevant information if they had been generally keeping each other informed. As the court recently observed in *U.S.* v. *Banks:*

> When officers function as a search team, it is appropriate to judge probable cause upon the basis of their combined knowledge, because we presume that the officers have shared relevant knowledge which informs the decision to seize evidence or to detain a particular person.[29]

The "official channels" rule

Under the "official channels" rule, officers may detain, arrest, or search a suspect based solely on a request or authorization to do so transmitted via a law enforcement database, such as NCIC, CLETS, and AWS. As the court noted in *U.S.* v. *McDonald*, "NCIC printouts are reliable enough to form the basis of the reasonable belief which is needed to establish probable cause for an arrest.[30]

Officers may also detain or arrest a suspect based solely on a request to do so from another officer. As the Supreme Court pointed out, "[E]ffective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information."[31]

For example, in *People* v. *Lara*[32] LAPD detectives developed probable cause to believe that Lara had committed a murder they were investigating. They also learned that he was staying with his sister in South Gate. So they asked South Gate officers to arrest him, which they did. On appeal, Lara contended that the arrest was unlawful because the South Gate officers had no information about the case. But the California Supreme Court ruled it didn't matter because they were "entitled to make an arrest on the basis of this information, as it was received through official channels."

Note, however, that when officers rely on information disseminated through official channels, the defendant may require prosecutors to prove they had received the information and that the disseminating officer reasonably believed it was accurate.[33]

Hearsay

In determining whether probable cause or reasonable suspicion exist, officers may rely on hearsay, which is essentially information from a civilian about something that he had seen or heard.[34] As the California Court of Appeal observed:

> The United States Supreme Court has consistently held that hearsay information will support issuance of a search warrant. . . . Indeed, the usual search warrant, based on a reliable police informer's or citizen-informant's information, is *necessarily* founded upon hearsay.[35]

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[29] (8th Cir. 2008) __ F.3d __ [2008 WL 80577]. ALSO SEE *Illinois* v. *Andreas* (1983) 463 U.S. 765, 771, fn.5 ["[W]here law enforcement authorities are cooperating in an investigation, as here, the knowledge of one is presumed shared by all."].
[30] (5th Cir. 1979) 606 F.2d 552, 554.
[31] *United States* v. *Hensley* (1985) 469 U.S. 221, 231. ALSO SEE *People* v. *Gomez* (2004) 117 Cal.App.4th 531, 540 ["[A]n officer may arrest an individual on the basis of information and probable cause supplied by another officer."].
[32] (1967) 67 Cal.2d 365. ALSO SEE *U.S.* v. *Burton* (3rd Cir. 2002) 288 F.3d 91, 99.
[33] See *People* v. *Harvey* (1958) 156 Cal.App.2d 516; *People* v. *Madden* (1970) 2 Cal.3d 1017.
[34] See *United States* v. *Matlock* (1974) 415 U.S. 164, 175; *Humphrey* v. *Appellate Division* (2002) 29 Cal.4th 569, 573.
[35] *People* v. *Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472.

Nevertheless, the value of hearsay depends on whether there was reason to believe it was accurate or that the source was reliable. As the court said in *People* v. *Superior Court (Bingham)*, "[W]hether hearsay or double hearsay information of criminal activity will support a search warrant depends not upon terminology or ritualistic formula, but upon the quality and persuasiveness of the information itself."[36] We will discuss this subject in more detail in the article beginning on page 11.

HOW THE FACTS ARE ANALYZED

Common sense takes center stage

Before 1983, probable cause rulings were often based on a "complex superstructure of evidentiary and analytical rules."[37] For example, even though there was good reason to believe that an informant's information was accurate, the courts would not consider it unless it satisfied the so-called "two-pronged" test of *Aguilar-Spinelli.*[38]

Fortunately, we don't need to discuss *Aguilar-Spinelli* or any of the other rules. That's because the United States Supreme Court in 1983 announced its decision in the case of *Illinois* v. *Gates*.[39] And in *Gates*, the Court did two things that had a dramatic impact on probable cause determinations: (1) it ruled that probable cause must be based on a consideration of all the relevant circumstances; and (2) it announced that the touchstone of probable cause is common sense.

Totality of the circumstances

Prior to *Gates*, many courts would begin their analysis by subjecting each of the facts cited by officers to a hypercritical examination, then disregard any that were not particularly suspicious or incriminating. This often resulted in rulings that officers lacked probable cause because none of the facts were compelling.[40]

In *Gates*, however, the Supreme Court rejected this "divide-and-conquer approach"[41] and replaced it with the "totality of the circumstances" standard by which the courts were required to base their rulings on an assessment of the convincing force of the information as a whole.[42]

This ruling resulted in two big changes in the law. First, probable cause can now be established by means of a combination of modestly incriminating information. Thus, when the defendant in *People* v. *McFadin* tried the old "divide and conquer" maneuver, the court responded with an apt metaphor:

> Defendant would apply the axiom that a chain is no stronger than its weakest link. Here, however, there are strands which have been spun into a rope. Although each alone may have insufficient strength, and some strands may be slightly frayed, the test is whether when spun together they will serve to carry the load of upholding the action of the magistrate in issuing the warrant.[43]

The other development was that an innocuous circumstance could become highly incriminating in

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[36] (1979) 91 Cal.App.3d 463, 473.
[37] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 235.
[38] See *Bailey* v. *Superior Court* (1992) 11 Cal.App.4th 1107, 1111 ["Prior to *Gates*, the reliability of an informer depended upon the prosecution establishing his veracity and the basis of his knowledge."].
[39] (1983) 462 U.S. 213.
[40] See *Massachusetts* v. *Upton* (1984) 466 U.S. 727, 732 [the lower court had judged "bits and pieces of information in isolation"].
[41] *United States* v. *Arvizu* (2002) 534 U.S. 266, 274.
[42] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 230-1; *United States* v. *Arvizu* (2002) 534 U.S. 266, 273; *United States* v. *Sokolow* (1989) 490 U.S. 1, 9 ["Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion."]; *U.S.* v. *Edwards* (5th Cir. 1978) 577 F.2d 883, 895 ["[P]robable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers. We weigh not individual layers but the 'laminated' total."]; *People* v. *Pitts* (2004) 117 Cal.App.4th 881, 889 ["While each of the individual pieces of information [the officer] relied upon were somehow flawed or inadequate . . . this court must take into account the totality of the circumstances—the whole picture."].*People* v. *Avila* (1997) 58 Cal.App.4th 1069, 1074 ["All of these factors, although perhaps individually harmless, could reasonably combine to create fear in the detaining officer."]; *U.S.* v. *Cantu* (10th Cir. 2005) 405 F.3d 1173, 1177 "While one fact alone may not support a finding of probable cause, a cumulative assessment may indeed lead to that conclusion."]; *U.S.* v. *Lovelock* (2nd Cir. 1999) 170 F.3d 339, 344 ["[Defendant] attempts to segment, isolate, and minimize each item of evidence"]; *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1393 ["The fact that some of these acts, if reviewed separately, might be consistent with innocence is immaterial."].
[43] (1982) 127 Cal.App.3d 751, 767.

light of other facts. As the Ninth Circuit observed, "Individual factors that may appear innocent in isolation may constitute suspicious behavior when aggregated together."[44] Thus, in *People* v. *Juarez* the court pointed out:

> Running down a street is in itself indistinguishable from the action of a citizen engaged in a program of physical fitness. Viewed in context of immediately preceding gunshots, it is highly suspicious.[45]

Another example is found in *Maryland* v. *Pringle*[46] in which an officer made a traffic stop on a car occupied by three men. Before long, he noticed some things inside the vehicle that caused him to think the men were involved in drug trafficking. One of the things was a wad of cash ($763) that the officer had seen in the glove compartment. But the lower court refused to consider the money because, in its myopic view, "[m]oney, without more, is innocuous." Not surprisingly, the United States Supreme Court reversed, simply pointing out that that "[t]he [lower] court's consideration of the money in isolation, rather than as a factor in the totality of the circumstances, is mistaken in light of our precedents."

Common sense

The Court in *Gates* also ruled that, in determining whether probable cause exists, the circumstances must be evaluated in light of common sense. Although probable cause was, from the start, conceived as a realistic assessment of the facts,[47] some courts had become relentless in their pursuit of some deficiency. So it became necessary for the Supreme Court to remind them of something:

> Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception. In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.[48]

Thus, in discussing probable cause for a search warrant, the California Court of Appeal pointed out, "[W]e do not examine [the affidavit] as if it had been drafted by a Wall Street law firm. Our touchstone is common sense."[49]

For example, in *U.S.* v. *Zamudio-Carillo* the court ruled that a Highway Patrol officer in Kansas reasonably believed that two cars were traveling together because both vehicles had Arizona license plates and they had been driven in close proximity for 25 miles.[50]

WHAT'S "PROBABLE?"

Probable cause is all about, well, probabilities. As the Fifth Circuit explained in *United States* v. *Garcia*, "It is almost a tautology to say that determining whether probable cause existed involves a matter of probabilities, but it nevertheless fairly describes the analysis we undertake."[51] Or, as the Supreme Court observed in *Illinois* v. *Rodriguez,* "[Probable cause] demands no more than a proper assessment of probabilities in particular factual contexts."[52]

But how much probability is required? Is it 80%? Or 51%? Less than 50%? The courts can't or won't say because they view probable cause and reasonable suspicion as nontechnical standards based on

[44] *U.S.* v. *Diaz-Juarez* (9th Cir. 2002) 299 F.3d 1183, 1141.
[45] (1973) 35 Cal.App.3d 631, 636.
[46] (2003) 540 U.S. 366.
[47] See *Brinegar* v. *United States* (1949) 338 U.S. 160, 176 ["The rule of probable cause is a practical, nontechnical conception"]; *United States* v. *Cortez* (1981) 449 U.S. 411, 418 ["Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers."].
[48] At p. 231. ALSO SEE *Illinois* v. *Wardlow* (2000) 528 U.S. 119, 125 [reasonable suspicion "must be based on commonsense judgments and inferences about human behavior."]; *U.S.* v. *Diaz* (9th Cir. 2007) 491 F.3d 1074, 1077 ["common sense is key"]; *U.S.* v. *Rice* (10th Cir. 2007) 483 F.3d 1079, 1083 ["We view the officer's conduct through a filter of common sense and ordinary human experience"].
[49] *People* v. *Veasey* (1979) 98 Cal.App.3d 779, 785.
[50] (10th Cir. 2007) 499 F.3d 1206.
[51] (5th Cir. 1999) 179 F.3d 265, 268. ALSO SEE *Illinois* v. *Gates* (1983) 462 U.S. 213, 231 ["In dealing with probable cause, as the very name implies, we deal with probabilities."]; *Maryland* v. *Garrison* (1987) 480 U.S. 79, 87 ["Sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment."].
[52] (1990) 497 U.S. 177, 184.

common sense, not mathematical precision. "The probable-cause standard," said the United States Supreme Court, "is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of circumstances."[53]

Still, it is often assumed that probable cause requires at least a 51% probability because anything less than 50% would not be "probable." Although this is true as a matter of statistics, the law views the matter somewhat differently. As noted earlier, the Supreme Court has ruled that probable cause requires only a "*fair* probability" or "substantial chance." And although the Court has never quantified this standard, it has said that it does not require more than a 50% chance.

Specifically, the Court ruled that probable cause requires neither a "preponderance of the evidence" nor "any showing that such belief be correct or more likely true than false."[54] Thus, the Fifth Circuit pointed out in *United States* v. *Garcia* that "the requisite 'fair probability' is something more than bare suspicion, but need not reach the fifty percent mark."[55]

As for reasonable suspicion, the Supreme Court has said it requires "considerably less" than a preponderance of the evidence,[56] which means it requires much less than a 50% chance.

Multiple incriminating circumstances

Instead of trying to calculate probability percentages (which is usually impractical or impossible anyway), officers are more likely to reach the right conclusion if they look for multiple circumstances linking the suspect to the crime. Although a single incriminating circumstance is sometimes enough (e.g., a positive ID by a victim, a fingerprint or DNA match), in most cases probable cause is based on a combination of circumstances that are much less incriminating. If so, each additional circumstance that comes to light—each "coincidence of information"[57]—will result in an exponential increase in the chances of having probable cause. And if one of them happens to be distinctive or unusual, it would be hard to imagine a court ruling that probable cause did not exist.[58]

For example, in *People* v. *Brian A*.[59] two teenage boys robbed a cab driver in Seaside. The next day, an officer spotted two teenagers in the vicinity who matched the general physical descriptions provided by the victim. He also noticed that, like the perpetrators, one of the boys was wearing a red sweat shirt, and the other was carrying a duffle bag. So he arrested them. On appeal, one of the boys contended that the officer lacked probable cause, but the court disagreed, pointing out:

> Where, as here, there were two perpetrators and an officer stops two suspects who match the descriptions he has been given, there is much greater basis to find sufficient probable cause for arrest. The probability of there being other groups of persons with the same combination of physical characteristics, clothing, and trappings is very slight.

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[53] *Maryland* v. *Pringle* (2003) 540 U.S. 366, 371. ALSO SEE *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 863 [reasonable suspicion "is an abstract concept, not a 'finely tuned standard'"].

[54] *Brown* v. *Texas* v. (1983) 460 U.S. 730, 742. ALSO SEE *People* v. *Tuadles* (1992) 7 Cal.App.4th 1777, 1783 ["requires less than a preponderance of the evidence"]; *People* v. *Fourshey* (1974) 38 Cal.App.3d 426, 430 [preponderance of the evidence is not required].

[55] (5th Cir. 1999) 179 F.3d 265, 269.

[56] See *United States* v. *Sokolow* (1989) 490 U.S. 1, 7 ["That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence."]; *United States* v. *Arvizu* (2002) 534 U.S. 266, 274 [reasonable suspicion "falls considerably short of satisfying a preponderance of the evidence standard"]. ALSO SEE *Richards* v. *Wisconsin* (1997) 520 U.S. 385, 394 ["This showing [for reasonable suspicion] is not high"].

[57] *Ker* v. *California* (1963) 374 US 23, 36. ALSO SEE *People* v. *Soun* (1995) 34 Cal.App.4th 1499, 1523 ["The coincidence with descriptions of the assailants, and the use of a car which was, at least, a very likely candidate for further investigation"].

[58] See *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1174 ["Uniqueness of the points of comparison must also be considered in testing whether the description would be inapplicable to a great many others."].

[59] (1985) 173 Cal.App.3d 1168. ALSO SEE *People* v. *Joines* (1970) 11 Cal.App.3d 259, 263 ["The fact that there were two persons fitting descriptions given for the two suspects narrowed the chance of coincidence."]; *People* v. *Britton* (2001) 91 Cal.App.4th 1112, 1118-9 ["This evasive conduct by two people instead of just one person, we believe, bolsters the reasonableness of the suspicion that there is criminal activity brewing."]; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1092.

Another example is found in *People* v. *Pranke*[60] in which Los Angeles police officers who were investigating a residential burglary learned the following: A few minutes before the break-in, a man had knocked on the door. When the owner opened it, he recognized the man as a casual acquaintance whom he had not seen in 18 months. The man said the reason for his unexpected visit was that he needed the phone number of a mutual friend. The owner gave him the number and the man left. A few minutes later, the owner left and, upon his return, discovered that his home had been burglarized.

When the victim reported the burglary, he told the officers about the unusual visit. So they went to the man's last known address and spoke with a neighbor who said the suspect had moved out, but that he had left some things with him. The officers examined the items and noted that some of them matched the descriptions of property taken in the burglary.

Did these circumstances add up to probable cause? Most definitely, said the court:

> It is unnecessary to establish the mathematical probability statistics, of (1) any given person visiting a casual acquaintance for the first time in a year and one-half; (2) a burglary occurring thereafter the moment the resident has departed the premises; (3) property stolen therefrom being found the following day in a box located in an apartment adjoining that formerly occupied by the visitor; and (4) the party in possession of the box having volunteered the information that its contents belonged to the visitor prior to the discovery that it contained the fruits of the burglary. It is merely necessary for us to hold, as we do, that when such remarkable coincidences coalesce, they are sufficient to warrant a prudent man in believing that the defendant has committed an offense.

One more example. In *People* v. *Hillery*[61] the body of a 15 year old girl was found in an irrigation ditch near her home in Kings County. She had been sexually assaulted. Witnesses reported seeing a "uniquely painted" black and turquoise 1952 Plymouth parked about two-tenths of a mile from the victim's house at about the time of her disappearance. There were boot prints in the area where the car had been parked, and they led in the direction of the victim's house. Deputies located the car and learned that the registered owner had a prior conviction for rape, and that he had worked at a ranch where the victim was employed as a baby sitter.

In ruling that this combination of circumstances established probable cause to arrest the defendant, the California Supreme Court said:

> The probability of the independent concurrence of these factors in the absence of the guilt of defendant was slim enough to render suspicion of defendant reasonable and probable.

Possibility of an innocent explanation

If probable cause or reasonable suspicion exist, it is immaterial that there might have been an innocent explanation for the suspect's conduct, or that it was otherwise possible that he had not committed the crime under investigation.[62] As the California Supreme Court explained in a detention case:

> The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal.[63]

This is also the view of the Supreme Court which has pointed out that the Constitution "accepts the risk that officers may stop innocent people. Indeed,

[60] (1970) 12 Cal.App.3d 935.
[61] (1967) 65 Cal.2d 795.
[62] See *United States* v. *Arvizu* (2002) 534 U.S. 266, 277 ["A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct."]; *People* v. *Glaser* (1995) 11 Cal.4th 354, 373 ["[T]hat a person's conduct is consistent with innocent behavior does not necessarily defeat the existence of reasonable cause to detain."]; *People* v. *Guajardo* (1994) 23 Cal.App.4th 1738, 1743 ["[T]he fact there may be some room for doubt is immaterial."]; *People* v. *Spears* (1991) 228 Cal.App.3d 1, 18-9 ["[T]he fact that particular conduct may be innocent is not the relevant inquiry."]; *People* v. *Tuadles* (1992) 7 Cal.App.4th 1777, 1784; *U.S.* v. *Del Vizo* (9th Cir. 1990) 918 F.2d 821, 827 ["It is of no moment that the acts of Del Vizo and his confederates, if viewed separately, might be consistent with innocence."].
[63] *Fare* v. *Tony C.* (1978) 21 Cal.3d 888, 894.

the Fourth Amendment accepts the risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent."[64]

OTHER ISSUES

Crime not yet reported: If the facts reasonably indicated that a crime had occurred, grounds to arrest or detain may exist even though the crime had not yet been reported.[65]

Mistakes of fact: If probable cause was based in whole or in part on information that was subsequently determined to be inaccurate or even false, a court may nevertheless consider this information in determining the existence of probable cause if the officers reasonably believed it was true. In the words of the Supreme Court, "[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable."[66]

Duration of probable cause: How long does probable cause last? It depends on whether it's probable cause to arrest or to search. Probable cause to arrest lasts forever unless new exculpatory evidence comes to light. This is because a person who is guilty of a crime will *always* be guilty of that crime. For example, officers in Washington D.C. still have probable cause to believe that John Wilkes Booth murdered President Lincoln.

On the other hand, probable cause to search for evidence of a crime will ordinarily disappear after a while because most physical evidence is moved, destroyed, or used up over time, sometimes a very short time. We will discuss this subject in more detail in the Summer edition.

What's "enough" information? If probable cause or reasonable suspicion exist, officers are not required to go out and look for exculpatory evidence.[67] As the court observed in *Ricciuti* v. *New York City Transit Authority,* "Once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest."[68]

But if the existence of probable cause is questionable, officers should, of course, continue their investigation. In such cases, said the California Court of Appeal, "it is the policeman's lot, with perhaps some difficulty, to smother his feeling that a suspect is occupied in crime, and to do his duty of gathering further evidence before applying for a search warrant."[69]

Making a judgment: In *Brinegar* v. *United States*, the Supreme Court pointed out that the line between mere suspicion and probable cause "must be drawn by an act of judgment."[70] We conclude this article with a comment by the U.S. Court of Appeals for the District of Columbia in which it reflected on the nature of this judgment:

> It is a very specialized form of judgment, an expertness in making evaluations under pressure in circumstances where an untrained person might well be at a loss. . . . As information is accumulated in the process of an investigation, the police must make not a single evaluation but a series of judgments. Inevitably this is something of a balance sheet process. Some of the information, and some of the factors which they observe, will add up in support of probable cause; some, on the other hand, may undermine that support. Finally, at some point the officer must make a decision, culled from a balance of these negatives and positives, and then act on his decision.[71] POV

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[64] *Illinois* v. *Wardlow* (2000) 528 U.S. 119, 126.
[65] See *People* v. *Vasquez* (1983) 138 Cal.App.3d 995, 1001; *People* v. *Stokes* (1990) 224 Cal.App.3d 715, 721.
[66] *Illinois* v. *Rodriguez* (1990) 497 U.S. 177, 185.
[67] See *People* v. *Guajardo* (1994) 23 Cal.App.4th 1738, 1743 ["[T]he fact that there may be some room for doubt is immaterial."].
[68] (2nd Cir. 1997) 124 F.3d 123, 128; *Baker* v. *McCollan* (1979) 443 U.S. 137, 145-6 ["[W]e do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence."]; *Hamilton* v. *City of San Diego* (1990) 217 Cal.App.3d 838, 845 ["[W]here probable cause to arrest has been established, we are not aware of any authority which suggests police officers must conduct some additional investigation before incarcerating a suspect."].
[69] *Bailey* v. *Superior Court* (1992) 11 Cal.App.4th 1107, 1113.
[70] (1949) 338 U.S. 160, 176.
[71] *Jackson* v. *U.S.* (D.C. Cir. 1962) 302 F.2d 194, 197.